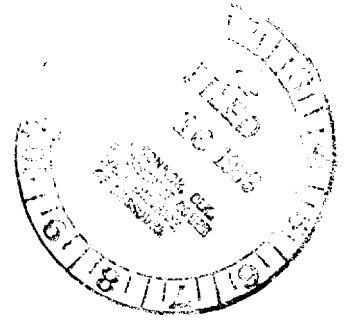


IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION



B. JEAN WEBB,

Plaintiff,

vs.

CITY OF REPUBLIC, MISSOURI,

Defendant.

No. 98-3306-CV-S-RGC-ECF

MEMORANDUM IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS FOR LACK OF
SUBJECT MATTER JURISDICTION

FACTS

On July 1, 1998, Plaintiff filed a Complaint alleging a violation of both the United States and Missouri constitutions by Defendant's display of its city seal. Plaintiff however, has recently moved out of the City of Republic. She now resides in Springfield, Missouri. (See Plaintiffs Deposition, p. 4, lines 1-3, attached hereto as Exhibit "A"). Plaintiff neither lives nor works in the City of Republic, and Plaintiffs children are enrolled in the Springfield, Missouri school system. (See Plaintiffs Deposition, p. 32; lines 13-15, and Deposition of Jeff Ward, p. 4, lines 7-12, attached hereto as Exhibit "B"). Consequently, Plaintiff no longer comes into contact with Defendant's city seal. (Plaintiffs Deposition, p. 34, lines 1-7, attached hereto as Exhibit "C").

LAW AND ARGUMENT

Plaintiff's Complaint and amended Complaints should be dismissed, pursuant to Rule 12(b)(1) of the Fed. R. Civ. P. Plaintiffs relocation from Republic, Missouri to Springfield, Missouri has rendered this case moot. This Court, therefore, no longer has jurisdiction, under Article III, § 2 of the United States Constitution, to rule in this case.

ORIGINAL

The rule is well-established: "[u]nder Article III of the Constitution, federal courts may adjudicate only actual, *ongoing* cases or controversies." Lewis v. Continental Bank Corp., 494 U.S. 472, 477 (1990). (Emphasis added). Federal courts are simply "without power to decide questions that cannot affect the rights of litigants in the case before them." Beachem v. Schriro, 141 F.3d 1292, 1293 (8th Cir. 1998), quoting North Carolina v. Rice, 404 U.S. 244, 246 (1971) (per curiam).

Moreover, "it is not enough that a dispute was very much alive when the suit was filed"; the "case or controversy requirement subsists through *all* stages of federal judicial proceedings, trial and appellate ... [and] [t]he parties *must* continue to have a 'personal stake in the outcome' of the lawsuit." Lewis v. Continental Bank Corp., 494 U.S. at 477-78 (emphasis added) (internal citation omitted). In particular cases, "[d]uring the course of litigation, the issues presented ... may lose their life because of the passage of time or a change in circumstances. When this happens and a federal court can no longer grant effective relief, the case is moot." Beck v. Missouri State High Sch. Activities Ass'n, 18 F.3d 604, 605 (8th Cir. 1994). "Mootness, therefore, acts as a jurisdictional bar ..." Arkansas AFL-CIO v. F.C.C., 11 F.3d 1430, 1435 (8th Cir. 1993).

Granted, courts **often** bifurcate their application of the mootness doctrine, applying it as to claims for injunctive -- or prospective -- relief, but not as to claims for compensatory damages for past conduct. This limited qualification of the mootness doctrine has no application in this case, however, as Plaintiff makes no claim for damages. She seeks only a declaratory judgment and injunctive relief. Plaintiff will not be affected by Defendant's future conduct, having chosen to relocate to another city. Under the Constitution, this Court is therefore powerless to grant her the relief she seeks.

The mootness doctrine was applied in a case similar to the present case in Grinols v. Mabus, 796 F. Supp. 972 (N.D. Miss. 1992). In that case, a constitutional challenge was dismissed as moot because the Plaintiff *had moved* out of the state against which he had filed suit. The Plaintiff left the State of Mississippi shortly after filing his lawsuit and

established residence in North Carolina. That court held that, "[b]y his own actions," Plaintiff had rendered his case "moot." Id. at 975.

In another case, a Plaintiff mooted his own Establishment Clause claims by moving out of the town where he had lived, and had sued to challenge the town's policy of permitting a private party to display religious murals in a public park. Doe v. Small, 934 F.2d 743, 749, n. 8 (7th Cir. 1990), decision vacated on other grounds, 947 F.2d 256 (7th Cir. 1991), reh'g en banc, 964 F.2d 611 (7th Cir. 1992). In that case, the court held that the original Plaintiffs claims became moot precisely because he had moved away **from** the offending conduct. It is important to note as well, that the court deemed irrelevant the fact that the Plaintiff had moved away because of harassment by fellow citizens regarding his opposition to the display in question.

The mootness doctrine was also applied in Beck v. Missouri State High Sch. Activities Ass'n, 18 F.3d 604 (8th Cir. 1994). In that case, a high school student challenged the constitutionality of rules restricting his eligibility to participate in interscholastic athletics for a period of one year following his transfer from one school to another, and the District Court ruled in his favor. By the time Defendant's appeal was heard, however, a year had passed and Plaintiff was again eligible to participate in athletic programs. The appeals court, therefore, vacated the lower court's ruling and remanded the case with instructions to dismiss the case as moot. Beck, at 605. The appellate court also rejected the invitation to rule on the constitutionality of the Defendant's policies **anyway**; the mere fact that those policies no longer affected the Plaintiff **left** the court with the authority only to dismiss the case as moot.

Finally, in Steele v. Van Buren Public Sch. Dist., 845 F.2d 1492 (8th Cir. 1988), the mootness doctrine was applied to a high school student who claimed a violation of her rights under the Establishment Clause by her "band instructor's" practice of offering opening prayers at mandatory rehearsals. The trial court ruled in her favor as to the constitutional issue. The school district appealed, however, and before the appeal was

fully resolved, the complaining student graduated. According to the appellate court, this change of circumstance rendered her claims against the school district moot.¹

In the present case, Plaintiff -- of her *own volition* -- has had a “change of circumstances. ” She removed herself from the City of Republic, choosing to live instead in another city instead. She is therefore no longer exposed to the “fish symbol” on Defendant’s city seal and the harm she claims to have suffered has ended.

At times a determination of mootness may be avoided if a Plaintiffs situation falls within an exception to the mootness doctrine known as “capable of repetition, yet evading review. ” This exception is applied, however, only under very limited circumstances. First, “the challenged action [must be] in its duration too short to be **fully** litigated prior to its cessation or expiration, and [] there [must be] a reasonable expectation that the *same complainingparty* would be subjected to the same action [by Defendant] again.” Murphy v. Hunt, 455 U.S. 478, 482 (1982) (per *curiam*) (emphasis added). The fact that other, similarly situated, Plaintiffs may face the same issue, even arising out of the same policy decision, is not sufficient to overcome mootness. Defunis v. Odenaard, 416 U.S. 13 (1974). Moreover, this “reasonable expectation” of repetition must be quite substantial, something akin to a “demonstrated probability,” and not merely a “physical or theoretical possibility.” Murphy, 455 U.S. at 482.

Plaintiff in this case fails every test suggested by these criteria. The conduct she complains of is not, by its nature, short in duration, nor is there any reason to believe that she will be subject to it again in the future.

¹ This did not moot the entire case, however, due to a procedural factor not present in this case. In Steele, the *mother* of the complaining student was the actual Plaintiff, suing “as parent and next friend of” her three minor children. The Court ruled that, despite her daughter’s graduation, the mother had standing to vindicate *her* constitutional rights -- *as a parent* -- to “challenge school-sponsored religious activities that affect [her] children.” Id. at 1495. The Court agreed with the school district, however, that “because she was graduated, *Jennifer’s* claim against the district [was] moot.” Id. (Emphasis added).

Plaintiff may attempt to salvage her claim by arguing that she is still entitled to at least nominal damages. But Plaintiff has made no request for nominal damages in this case and courts should not “read into” a Complaint a request for nominal damages, nor grant them under a “catch-all” request for relief. See Fox v. Bd. of Trustees, 42 F.3d 135, 142 (2nd Cir. 1994) (the court rejecting the “nominal damages” argument because none were specifically requested in the Complaint, and refusing to “read into” the Complaint such a request in order “to breathe life into a moribund dispute.”) (internal citation omitted).

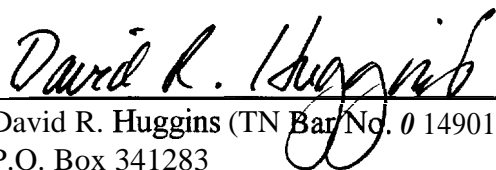
In this case Plaintiff has simply effected her own remedy by removing herself from conduct she believed injurious. She has no further need of this Court’s assistance and, thus, no further claim upon its limited resources. This Court can now render nothing more than an advisory opinion in this matter, something unquestionably proscribed by Article III, § 2 of the Constitution.

CONCLUSION

In light of the foregoing, Defendant respectfully requests that this Court dismiss Plaintiffs claims as moot.

Respectfully submitted,

THE NATIONAL LEGAL FOUNDATION

A handwritten signature in black ink, reading "David R. Huggins", is written over a horizontal line.

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Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby **certify** that I have served a true and correct copy of the foregoing on counsel for Plaintiff, Stephen Douglas Bonney, Esq., 215 West 18th Street, Kansas City, MO 64108, via U.S. Mail, postage prepaid, on this the 10TH day of February, 1999.

David R. Huggins
David R. Huggins

1 Q Okay. Now, could you state where you currently
2 reside?
3 A 1450 East Crestview, Springfield, Missouri.
4 Q Okay. For how long have you resided there?
5 A About two weeks.
6 Q Okay. Do you rent or own that property?
7 A Wejrent.
8 Q Where did you live just prior to that?
9 A 334 South Basswood in Republic.
10 Q And for how long did you reside there?
11 A One year.
12 Q Did you rent or own that property?
13 A We rented.
14 Q And where did you live immediately prior to that?
15 A 209 South Main in Republic.
16 Q Okay. Was that your first residence in Republic?
17 A Yes, it was.
18 Q Okay. Where did you live before moving to
19 Republic?
20 A We lived in Aurora, Missouri.
21 Q And for how long did you reside there?
22 A From 1985 to 1995, 10 years.
23 Q Okay. Are you presently employed?
24 A No,. I am not.
25 Q Okay. And you forgive me if I use the wrong

1 A Yes.

2 Q Ark you aware of whether that was recorded on

3 videotape?

4 A There were video cameras there from news stations,

5 so I'm assuming it was.

6 Q Okay. Could you tell me where Jessica attended

7 school last year?

8 A At Republic.

9 Q What would the name of the school be?

10 A Oh, I'm sorry, Republic Middle School.

11 Q Okay, and what grade was she in last year?

12 A She was in eighth.

13 Q Eighth grade. And it's my understanding that she

14 is/now being home schooled, is that correct?

15 A No, she is at Parkview High School in Springfield.

16 Q Okay. When did she begin attending there?

17 A Last week.

18 Q Was she home schooled for some period of time?

19 A She was homebound schooled through the school here

20 in Republic.

21 Q Was that something that you elected to do?

22 A That was something that her counselor insisted on

23 and her psychiatrist agreed to.

24 Q Could I ask you what the significance of the

25 pinnacle is that you're wearing?

1 Q Okay. Could you give me your complete address?
2 A 1450 Crestview, Springfield, Missouri.
3 Q Okay. What is your age?
4 A 16.
5 Q Now, have you ever been deposed before?
6 A No,
7 Q Okay. Do you attend a public school?
8 A Yes.
9 Q Okay. Which school is that?
10 A Parkview.
11 Q Is that in Springfield?
12 A Mm-hmm.
13 Q What grade are you in?
14 A I am a sophomore.
15 Q Okay. Now, I just want to ask you a few questions
16 about alleged incidents of harassment. Have you
17 ever been subjected to acts of harassment by anyone
18 due to your religious beliefs or practices?
19 A Could you explain that?
20 Q Well, I know harassment is a term that doesn't have
21 a precise meaning, have you ever in your opinion
22 been mistreated by any of the students at your
23 school, at any school you have attended because of
24 the fact that you may be of a particular religious
25 persuasion?

1 Q And I just want to clarify your earlier answer to
2 my question about how frequently you believe you
3 observe the fish symbol on automobiles, or the City
4 seal? Pardon me, how frequently you observed the
5 City seal? I believe you said you had observed it
6 --
7 A Now I don't see it at all.
8 Q -- while you lived in Republic --
9 A Uh-huh.
10 Q -- I believe you stated that you had observed it
11 hundreds of times?
12 A Yes.
13 Q Okay, and that is good information but I'm
14 wondering if you could say how frequently on -- You
15 typically observed it, whether daily, weekly --
16 A Daily, yes.
17 Q -- daily, okay.
18 MR. HUGGINS: That is all I have.
19 MR. BONNEY: I have nothing.
20 MR. HUGGINS: You have nothing?
21 MR. BONNEY: We'll read and sign
22 and waive presentment.
23 That means that you will get a
24 chance to read your deposition, make any
25 corrections limited basically to, you